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# Our Chief Executive

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one. If we drift on without a co-operative and concentrated action the "suspicion" of that great living body, the masses, will grow into a "conviction." And then, not only will we have failed in our purpose, but the legal profession will no longer be called a profession, but rather a business—and not the most honorable of businesses at that.

E. L. FOWLER, Evansville (Ind.) Bar.

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**\*OUR CHIEF EXECUTIVE.**

In order to understand the powers given to, and the limitations placed upon, the President of the United States, it is necessary to have an intelligent conception of that instrument wherein these powers and limitations are defined. That instrument is the Federal Constitution. "A constitution is but a law; it emanates from the people, the depository, and the only one, of all political power; it is therefore the supreme law." *Commonwealth v. Collins*, 8 Watts, 331. Judge Story has well defined it as "a fundamental law or basis of government, constituting not a cause but a consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience." It is to this personal and political freedom that the Preamble to the Constitution of Massachusetts refers, in saying:

"When one becomes a member of society, he necessarily parts with some rights or privileges which as an individual not affected by his relations to others, he might retain. A body politic is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."

Chief Justice Black has given rather a clear statement concerning the origin of our political system in *Sharpless v. Mayor of Baltimore*, 21 Pennsylvania, 147. He said:

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\*This article is based chiefly upon a review of Judge Wm. H. Taft's book, "Our Chief Executive," Columbia Press.

"In the beginning the people held in their own hands all the power of absolute government. The transcendent powers of Parliament devolved on them by the revolution. Antecedent to the adoption of the Federal Constitution, the power of the states was supreme and unlimited. If the people of Pennsylvania had given all the authority which they themselves possessed to a single person, they would have created a despotism as absolute in its control over life, liberty, and property as that of the Russian autocrat. But they delegated a portion of it to the United States, specifying what they gave, and withholding the rest. The powers not given to the government of the Union were bestowed on the government of the state, with certain limitations and exceptions, expressly set down in the state Constitution. The Federal Constitution confers powers particularly enumerated; that of a state contains a general grant of all not excepted. The construction of the former is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The Federal government can do nothing but what is authorized expressly or by clear implication; the state may do whatever is not prohibited."

And so, to the head of such Federal government, whose powers sprang solely from the freely surrendered liberties of the American people, and were definitely limited by a written constitution, came the first President of the United States. The desire for a popular government and the example of George III.'s corrupt autocracy on the one hand, and a fear of the unformed and untried on the other, made the convention doubtful as to the expedient form through which the executive power should move. The minority, led by Roger Sherman, thought that the President should be simply the agent of the legislature, and others thought that even greater protection was necessary, advocating that the real executive authority should be vested in a number of persons. On the other hand, Hamilton believed that the President should be given great independent power, and should, moreover, be elected for life. That, through a spirit of compromise, a more satisfactory and ideal type of executive was reached than would have been attained through a precise following of either of these opposite views, no one need doubt. Indeed, while the activities of the President are rather jealously supervised by Congress, and although he is surrounded by a circle of advisers in the members of his Cabinet,

yet the Constitution, in providing a sole executive head, has created the regulating power best fitted to keep the affairs of the nation in a serene and rational progress.

The Constitution itself makes no provision for a Cabinet or President's council as such; that is simply a creation of the Chief Executive, which could be dispensed with at any time he chose. Lincoln is said to have remarked that, after all the discussion and sharing of opinions in the Cabinet meetings, the vote was always unanimous, since only the President had a vote. The bi-weekly meetings, which it is the President's custom to hold, doubtless are great clearing houses for government problems, and yet when one reviews the division and dissension which has existed in some of the Cabinets of the past, the wisdom of our forefathers in placing the one vote in the hands of the Chief Executive can be readily appreciated. Doubtless the Father of His Country had need for great poise, with Jefferson and Hamilton members of his official household, both seeing so differently and antagonistically most political and governmental questions. That Jefferson appreciated this is clearly seen in a letter, which he wrote in answer to a French publicist, who had been advocating a plural executive for a free government. He said:

“The failure of the French Directory seems to have authorized a belief that the form of a plurality, however promising in theory, is impracticable with men constituted with the ordinary passions, while the tranquil and steady tenor of our single executive, during a course of twenty-two years of the most tempestuous times the history of the world has ever presented, gives a rational hope that this important problem is at last solved. Aided by the counsels of a Cabinet of heads of departments originally four, but now five, with whom the President consults, either singly or altogether, he has the benefit of their wisdom and information, brings their views to one center, and produces an unity of action and direction in all the branches of the government. The excellence of this construction of the executive power has already manifested itself here under very opposite circumstances. During the administration of our first President, his Cabinet of four members were equally divided by as marked an opposition of principle as monarchism and republicanism could bring into conflict. Had that Cabinet been a directory, like positive and negative quantities in algebra, the opposing wills would have balanced each

other and produced a state of absolute inaction. But the President heard with calmness the opinions and reasons of each, decided the course to be pursued, and kept the government steadily in it, unaffected by the agitation. The public knew well the dissensions of the Cabinet, but never had an uneasy thought on their account, because they knew also they had provided a regulating power which would keep the machine in steady movement."

In these days, when every voter has his eyes focused directly upon the Presidential candidate himself, and the elector is but a figure-head, it is interesting to remember that it was not so intended in the project of the original plan. The following is taken from President Wilson's "Congressional Government:"

"Once the functions of a presidential elector were very august. He was to speak for the people; they were to accept his judgment as theirs. He was to be as eminent in the qualities which win trust as was the greatest of the Imperial Electors in the power which inspires fear. But now he is merely a registering machine, a sort of bell-punch to the hand of his party convention. \* \* \* This is just the plain fact, that the electors are the agents of the national conventions; and this fact constitutes more than an amendment of that original plan which would have had all the electors to be what the first electors actually were, trustworthy men given carte blanche to vote for whom they pleased, casting their ballots in thirteen state capitals in the hope that they would happen upon a majority agreement."

Hamilton laid great stress upon the wisdom of placing the choice of a President in the hands of a small number of experienced and trustworthy men. In the *Federalist*, No. LXVIII, he writes at length upon this subject, and after extended reference to the electors, says:

"Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to center in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office."

It is often said that the President of the United States is endowed with greater governmental power than any monarch of Europe. This is almost more than an inaccuracy. The German Emperor, the Emperor of Austria, and the Emperor of Russia, while all supported by legislative bodies more or less representative of the people, all have far greater power than the President. The King of England "reigns but does not govern. \* \* \* In France the President presides, but does not govern." Now, the Premier of England is in a measure more powerful than the President, both exercising legislative and executive functions.

The veto power of the President is his only legislative function. Article 1, section 7, number 2, of the Constitution provides that, after both Houses shall have passed a bill, it shall be presented to the President. "If he approve he shall sign it, but if not he shall return it," and before it may then become a law, it must be passed again, this time by a two-thirds vote of both Houses. Concerning the President's veto, Mr. Edward Campbell Mason, in a Harvard publication, advances an interesting theory as to its rise. He regards it as the vestige of a once broad, affirmative, legislative function of the King. He says that in early days Parliament would petition the King for the enactment of a certain law, and the law became effective through the King's proclamation. In case the King wished to alter the law as offered to him in the petition, he did so, and thus sometimes his subjects got something quite different from what they asked or desired. As the influence of the people grew stronger, they resented the King's interference, and finally dared ask him either to proclaim the legislation as it was offered, or return it with his veto. His function therefore became purely negative. It is sometimes thought that a President may veto a bill only when he considers it unconstitutional, but this is not true. He may veto it, and the Constitution makes it his duty so to do, in case he does not "approve." And, of course, no matter how thoroughly he would approve the benefits to be derived from a measure, if he believes it to be unconstitutional, it is his sworn duty to veto it. In this respect, perhaps, a more delicate discrimination is exacted of him than of the Supreme Court itself, for it is necessary that he shall approach the measure in an entirely unbiased frame of mind, having

formed no idea as to its constitutionality or unconstitutionality. But when the measure is brought before the Supreme Court, there is a strong presumption, through the act's having been passed by Congress, that it is valid, and before holding it otherwise, the court must be convinced beyond a reasonable doubt, that Congress, in passing it, has clearly passed beyond the limit of its authority. Mr. Taft has aptly said, "If the court has any doubt about the validity of a law, it is bound to sustain it, and it has no right to set aside a law merely because of a difference of opinion between it and the legislature as to the legislative powers."

Although the power to veto is often spoken of as the "royal prerogative" of the White House, it is interesting to note, that, while often exercised by the President, the King of England, who also enjoys the same prerogative, has not dared to exercise it in the last two hundred years. And, in truth, the veto of the White House may more truly represent the voice of the people than does the majority vote of Congress. For the President is the executive of all the citizens of the United States, while too often Senators and Representatives are bound by the narrow limits of their own constituency. The fact that the President has not the power to veto certain items of a bill, and approve the remainder, but must either accept or reject it as a whole, has often been the means of bringing great pressure to bear upon him. It has sometimes happened that Congress has put upon a measure, of which he did not approve, a "rider" carrying necessary appropriations, thus placing the President in the dilemma of either passing an act of which he did not approve, or defeating certain appropriations necessary for the upkeep of the governmental machine. Because of this, it has been suggested that the President might be given the power to veto certain items of a bill, and approve the remainder. If we had, what every other government has, a recognized budget system through which our appropriation could be regulated and systematized, not only would this difficulty in the exercise of the one legislative function of the President be greatly obviated, but the tremendous problem that is confronting the American people in the checking of the wasteful extravagance of the Federal government would be practically solved. Until this or some similar system is placed in operation, the

people must continue to see hundreds of thousands of their American dollars practically wasted in river and harbor bills, public building bills, and other measures, which are for things not only often unnecessary, but sometimes unused.

The entire executive power of the Federal government is vested in the President. He is the executive department of the government. He is the Commander in Chief of the army and navy, and of the militia when called into the actual service of the United States; he may "grant reprieves and pardons for offenses against the United States, except in cases of impeachment;" he may make treaties, with the concurrence of the Senate; he may, upon occasion, convene or adjourn Congress; he shall nominate and, with the consent of the Senate, appoint ambassadors, consuls, judges of the Supreme Court, and certain other officers; he shall receive ambassadors and other public ministers; he shall commission all the officers of the United States; he may require reports of the various officers of the executive departments; he shall, upon occasion, fill vacancies in office; he shall give to Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he shall take care that the laws be faithfully executed.

President Wilson, in performing the duty of informing Congress concerning the state of the union, and recommending measures for its adoption, has gone back to the custom of Washington and Adams, in presenting his message by means of a personal address. In Washington's day, the Senate was a small body of only twenty-eight or thirty men, and it was but natural that when he wished to say something to its members or hear something from them, he should go in person to the Senate Chamber. Jefferson, though, had neither pleasure in, nor aptitude for public speaking, and so preferred to send to Congress written messages, thus instituting a precedent which has been consistently followed from that time until the past administration.

One of the heaviest burdens of the executive life is in the duty to appoint and commission officers. Aside from the great economic waste and necessary inefficiency which must always come from the time-worn usage of dividing, even to the least important office, the spoils among the victors, it seems an unfair and a foolish thing that,



along with the great burdens of state, the President should have to bear also the nagging cares incident to the multitudinous selections for the minor offices. It is true that he is always supported by the willing counsel of the local Congressman, but, alas, too often he is advised by not one but several, whose advice, while equally solicitous, leads in directly opposite directions. That the hand which signs the epoch making treaties of our nation must also determine the postmaster for Hollow Bend, Arizona, is scarce more ludicrous than tragic. The waste of the President's time and the consumption of his nervous energy through these minor duties, constitute a strain which no nation has the moral right to put upon the man into whose hands she so entirely places the welfare of her millions of citizens. It is interesting to note, in passing, that out of the question of the commission of a minor office, came one of the greatest cases ever decided in the Federal courts. Chief Justice Marshal, in the celebrated case of *Markbury vs. Madison*, 1803, held that "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." This decision, although Jefferson denounced it as usurpation of judicial power, has been authority for more than one hundred years, and settles conclusively that the judiciary is to mark the limits of power of the other two branches of the government.

If the executive power in domestic affairs is divided between the Federal and state governments, the framers of the Constitution have certainly made sure that, in respect to any relation with foreign governments, the Federal government should have exclusive jurisdiction. Not only by implication, but by express prohibition, the states are forbidden to make treaties, to levy import duties, to maintain a standing army or navy, or to declare war. The sole initiative in the making of treaties with foreign nations is with the President, and our ambassadors and ministers in other lands are his personal representatives. The power and duty of recognizing any foreign government is vested in him, and he receives all representatives of foreign countries. The President, by virtue of his being the Commander in Chief of the army

and navy, may virtually declare war. While the nominal authority to do this is vested in Congress, yet by his control of the military forces of the United States, he may easily take such action as to leave Congress no option but to declare it. Such a charge was made against Polk concerning the Mexican War.

It is interesting to compare the two conflicting theories that are advanced by statesmen, concerning the limitations upon the powers of the President; whether there is a residuum of power vested in him or not; that is, whether the President may do anything which is not prohibited by the Federal Constitution and the acts of Congress in pursuance thereof, or whether he can do only those things which the Constitution or Congress specifically or by implication empower him to do. Mr. Roosevelt, by deed as well as by word, has been an ardent exponent of the former theory. In his "Notes for a Possible Autobiography" he says:

"My view was that every executive officer in high position was a steward of the people, bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt this view that what was imperatively necessary for the nation could not be done by the President, unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional prohibition."

Nor was he alone in his views. Mr. Garfield, when making his report to Congress, as Secretary of the Interior, said:

"Full power under the Constitution was vested in the Executive Branch of the Government and the extent to which the power may be exercised is governed wholly by the discretion of the Executive unless any specific act has been prohibited either by the Constitution or by legislation."

It is eminently fitting, in the light of present day politics, that the exactly opposite and more conservative view should be taken by Mr. Taft, and in this he has been preceded by other very eminent statesmen. From an answer to Story's "Commentaries on the Constitution" made by Abel P. Upshur, who succeeded Daniel Webster as Secretary of State under President Tyler, the following is quoted:

"We have heard it gravely asserted in Congress that whatever power is neither legislative nor judiciary, is of course executive, and as such, belongs to the President under the Constitution. How far a majority of that body would have sustained a doctrine so monstrous, and so utterly at war with the whole genius of our government, it is impossible to say, but this, at least, we know, that it met with no rebuke from those who supported the particular act of executive power, in defense of which it was urged. Be that as it may, it is a reproach to the Constitution that the executive trust is so ill-defined, as to leave any plausible pretense even to the insane zeal of party devotion, for attributing to the President of the United States the powers of a despot; powers which are wholly unknown in any limited monarchy in the world."

Mr. Justice Miller, in *Gaines v. Thompson*, 7 Wallace, 347, says:

"We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

In one of the Blumenthal lectures given at Columbia University during the winter session of 1915-1916, Mr. Taft gave a clear conception of what would seem to be the better view, when he said:

"The true view of the executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the *Neagle* case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of executive

power are necessarily in general terms in order not to embarrass the executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist." LENA M. PHILLIPS, '17.

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## IMPORTANT CASES DECIDED BY THE COURT OF APPEALS OF KENTUCKY.

Hardaway v. Webb.

(Decided December 6, 1916.)

Appeal from Letcher Circuit Court.

1. Boundaries—Description—Original Plat as Evidence.—The original plat constituting the basis of a patent is competent as evidence to explain a mistake or ambiguity in the description given by the patent of the land granted, or to supply the omission by such description of a course, distance or object necessary to correctly determine and fix its boundary.

2. Boundaries—Description—Mistake in Call Corrected From Original Plat.—A call in a patent will be corrected to correspond with that given on the original plat where it appears that without the correction certain well defined corners would be missed and the survey would not close.

3. Boundaries—Evidence—Estoppel.—The fact that defendant eighteen years before the institution of the action, when he himself entertained doubt as to his ownership of the land in controversy, failed to object to the cutting by another of timber thereon, did not affect the true location of its boundary or militate against his right to thereafter claim ownership and maintain adverse possession of the land.

4. Appeal and Error—Review—Estoppel—Question of Fact.—Finding of Court—When Not Disturbed on Appeal.—On a plea of estoppel in an equitable action, there being conflicting evidence as to the statements of defendant relied on to establish the estoppel and the chancellor having refused to sustain the plea, this court will not disturb his finding where after review of the evidence it is in doubt as to the truth of the matter.